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Supreme Court of the United States.

October Term, 1932.

No. 407

GEORGE B. MUNROE, Receiver,
Petitioner,

v.

LOUIS RAPHAEL,
Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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GEORGE B. MUNROE, RECEIVER,
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v.
LOUIS RAPHAEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George B. Munroe, as receiver of Munroe Stores, Inc., a Massachusetts corporation having an usual place of business in Massachusetts, by decree of the United States District Court for the District of Massachusetts entered on July 23, 1930, respectfully petitions this Court for a writ of certiorari to require that there be certified to this Court for review and determination the cause the record of which remains in the Circuit Court of Appeals for the First Circuit, wherein your petitioner was the appellee and Louis Raphael, a citizen and resident of Connecticut, was the appellant, and wherein on June 27, 1932, a judgment was entered against your petitioner, reversing an order of the United States District Court for the

District of Massachusetts entered on December 7, 1931, which modified a previous order of said District Court dated March 23, 1931, whereby said Louis Raphael was permitted to sue the principal and sureties on a bond given by the purchaser of the business and assets in the hands and possession of your petitioner as such receiver, and which order of December 7, 1931, enjoined and restrained said Louis Raphael from further prosecuting a suit which he had brought on said bond in the Superior Court of the Commonwealth of Massachusetts pursuant to said permission from the District Court.

Reasons for the Writ.

Your petitioner respectfully submits the following reasons for the allowance of his petition for a writ of certiorari in this action:

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals has made a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter.

4. The considerations at stake in the judgment of the Circuit Court of Appeals and the results thereof are of so grave and serious a nature as to warrant review by this Court.

5. The decision of the majority of the Circuit Court of Appeals is in error in law and fact and is opposed by a dissenting opinion of Mr. Justice Morton.

Wherefore your petitioner prays that a writ of certiorari issue to the end that said cause may be reviewed and determined by this Court as provided by law, and that said

decision of the Circuit Court of Appeals for the First Circuit of June 27, 1932, be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

GEORGE B. MUNROE,
Receiver of Munroe Stores, Inc.,
By his Attorneys,
WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.

Supreme Court of the United States.

OCTOBER TERM, 1932.

GEORGE B. MUNROE, RECEIVER,
Petitioner,
v.
LOUIS RAPHAEL,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF JURISDICTION.

This application for a writ of certiorari is governed by the Act of February 13, 1925, chapter 229, section 1; 43 Stat. 938; Code of Laws of the United States, title 28, section 347; and by the Rules of this Court adopted June 5, 1928 (275 U.S. 622). It meets the requirements outlined in these rules.

STATEMENT OF FACTS.

On July 14, 1930, a bill in equity for the appointment of a receiver for Munroe Stores, Inc. (hereinafter called The Stores), a Massachusetts corporation having an usual place of business in Massachusetts, was brought in the United States District Court for the District of Massachusetts (R. 1 and 2, par. A).

On July 23, 1930, the District Court appointed George B. Munroe of Quincy, Massachusetts, your petitioner, as receiver, and on the same day he gave bond and duly qualified (R. 2 and 3, par. D).

In compliance with an order of the District Court requiring all persons holding claims against The Stores to present their proofs therefor to the receiver for allowance on or before September 30, 1930 (R. 10, par. 3), Louis Raphael, a citizen and resident of Connecticut and the respondent herein, presented his proof of claim on September 25, 1930, and on February 9, 1931, it was duly approved and allowed in the sum of $35,000 (R. 10, par. 4).

Shortly prior to November 26, 1930, one Harold F. Dempsey made an offer in writing to purchase from your petitioner, the receiver, all the assets of The Stores (R. 9, par. 1, and R. 12-15). By the terms of this offer Dempsey agreed to "pay thirty percent of the claims of all the creditors of The Munroe Stores, Inc. in or within thirty days after their claims have been duly approved and allowed" (R. 12, par. 1) and to present to the District Court within seven days from the acceptance of the offer "a bond in the penal sum of $100,000.00 with good and sufficient sureties, the conditions of the bond being that if I perform the obligations of the offer said bond shall be null and void" (R. 14, par. 7). Accompanying the offer was a bond signed by said Dempsey as principal and Louis F. Buff and Clifford S. Drake as sureties, by the terms of which they were "bound and obliged unto the United States of America, in the full and just sum of $100,000 to the payment of which to the said United States of America, we bind ourselves," and on condition that Dempsey "shall comply with all the conditions and items of said offer" (R. 15 and 16).

On November 26, 1930, this written offer to Dempsey was duly accepted by your petitioner, the receiver, pursuant to an order of the District Court, and thereafter Dempsey filed said bond in the District Court (R. 10, par. 2). The bond

and the sureties thereon were duly approved by the District Court on December 2, 1930 (R. 10, par. 2), and the assets of The Stores were turned over to Dempsey by the receiver (R. 11, par. 6).

The amount to be paid Raphael, the respondent herein, under the terms of the offer, was $10,500 (R. 10, par. 4), but only $1200 was paid him on account of this sum (R. 11, par. 5). Accordingly, on March 23, 1931, more than thirty days after his claim against The Stores had been approved and allowed, Raphael filed a petition in the original receivership proceedings in the District Court, praying "that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce" the obligation of Dempsey and his sureties on the bond (R. 9-11). On the same day the following order was entered by the District Court: "Petition allowed, leave to sue granted to petitioner, Louis Raphael" (R. 12).

Thereupon, on April 9, 1931, Raphael brought suit on said bond against Dempsey and his sureties in the Superior Court of the Commonwealth of Massachusetts (R. 3, par. 1, and R. 37, par. 4), and the case was referred to a master (R. 37, par. 5).

Dempsey was in default in paying the claims of the other creditors of The Stores as provided in the offer (R. 17, par. 4), and accordingly, on April 16, 1931, the receiver, your petitioner, filed an ancillary bill of complaint in the original receivership proceedings in the District Court, against said Dempsey and his sureties, Buff and Drake, as obligors on the bond (R. 16-20), and in this ancillary bill the receiver sought to force Dempsey and his sureties to pay over to the Clerk of the District Court, for the use and benefit of the receiver, the creditors of the receiver and the creditors of The Stores, the balance due on account of the purchase price of the assets of The Stores (R. 20, par. 2). This balance included the remainder of the dividend due Raphael, the respondent herein (R. 4, par. J). On July 16, 1931, after

notice in hearing, all parties to the bill consenting, a decree was entered by the District Court in which it was "ordered, adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83 together with costs be entered against the defendants" Drake, Buff and Dempsey (R. 23). This sum of $33,026.83 included the amount due Raphael (R. 4, par. J).

Nothing was obtained on execution on this judgment, and on October 7, 1931, the receiver, your petitioner, filed in the original receivership proceedings in the District Court a petition for contempt as to the defendants Buff and Drake, sureties on the bond (R. 23-27). At the hearing on this petition the District Court ordered the sureties to pay the receiver $1000 on the 20th of October, 1931, and a like sum on the 20th of each month thereafter until the execution issued on the judgment in the ancillary bill was satisfied, the final disposition of the matter being held pending further orders of the Court (R. 29). Pursuant to this order the sureties, Buff and Drake, are paying $1000 a month to the counsel for the receiver (R. 4, par. K).

In the meantime the suit on the bond by Raphael against Dempsey and his sureties in the Massachusetts Court was prosecuted to a point where the master's report was filed, and was confirmed by the Court on October 20, 1931 (R. 38, par. 6). Thereafter, on November 13, 1931, Raphael filed a motion in the State Court proceeding for the entry of a final decree, and presented a form of draft decree (R. 38, par. 7). The master found for Raphael in the amount of $9300 and interest (R. 31 and 32, par. 1), and the draft decree directs the sureties, Buff and Drake, to pay this amount, and on their failure to satisfy this indebtedness directs a special master to collect and sell certain of their properties and use the proceeds thereof to satisfy the amount of the decree (R. 32, pars. 4, 5 and 6).

On November 27, 1931, the receiver, your petitioner, filed a motion in the original receivership proceedings in the Dis-

trict Court, seeking to have modified the order of March 23, 1931, which granted Raphael, the respondent herein, leave to bring suit on the bond, and seeking to enjoin Raphael from further prosecuting his cause of action in the Massachusetts Court (R. 30-31). Raphael filed a plea to this motion of the receiver on December 3, 1931 (R. 36-41), and after a hearing the District Court entered an order on December 7, 1931, modifying its order of March 23, 1931, whereby Raphael was permitted to sue on the bond, and enjoining Raphael from further prosecuting his suit in the Massachusetts Court, except that he might proceed to judgment, but no further (R. 63-64). The District Court further ordered Dempsey and his sureties to pay Raphael the sum of $390.60 interest and his costs in the State Court proceeding, amounting to $171.10 (R. 64).

On December 28, 1931, Raphael filed an appeal from this order of the District Court entered on December 7, 1931 (R. 64), together with an appeal bond (R. 67), and an assignment of errors in support of his appeal (R. 65-66).

On June 27, 1932, the Circuit Court of Appeals for the First Circuit reversed this order of the District Court entered on December 7, 1931, and remanded the case to that Court (R. 82). Mr. Justice Morton dissented from the majority of the Court, however, saying: "The Dempsey bond and all proceedings on it were, essentially, parts of the liquidating receivership in the District Court. The whole thing ought to have been retained there. The order permitting suit in the State Court, if it amounted to anything, was ill advised. The District Judge was right in recognizing that fact and revoking the order" (R. 81).

A certified copy of the entire record in this case, including the majority opinion of the Circuit Court of Appeals and the dissenting opinion of Mr. Justice Morton, is presented herewith.

Argument.

FIRST

The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

The questions which the Circuit Court decided were as follows:

1. Is the bond a *res* in the receivership proceeding, and in the possession and under the control of the District Court through the receiver, its officer?
2. Has the United States, through the receiver, its officer, the sole right to sue on the bond?
3. If the United States has a sole right to sue on a bond, and if the United States can give an individual creditor permission to sue on the bond, is the granting of such permission a final decree, or is it a discretionary, administrative order which can be modified at any time?

None of these questions have ever been decided by this Court, and there are no authorities directly in point on these issues. In each case cited by a majority of the Circuit Court the situation and the facts were distinguishable from those of the case at bar.

The case of *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337; id. 171 Fed. 43, comes the closest of any authority to the exact set of facts in the case before this Court. In that case, however, the purchaser of the assets of the business in receivership gave no bond running to the United States, and in fact gave no bond at all; there was merely the promise on the part of the purchaser to pay the creditors. It is therefore clearly distinguishable from the case at bar. Furthermore, the Guardian Trust cases were not decided by this Court. They were decisions of a Circuit Court of Appeals.

The facts in *Kline et al.* v. *Burke Construction Co.,* 260 U.S. 226; *Hull* v. *Burr,* 234 U.S. 712; *Julian* v. *Central Trust Co.,* 193 U.S. 93; and *Richle* v. *Margolies,* 279 U.S. 218, are not as nearly in point with the present case as are those of the Guardian Trust Co. cases. They are cited by the majority of the Circuit Court as setting forth the principle that the Federal Court cannot enjoin a proceeding in a State Court unless a *res* in the custody of the Federal Court is affected or interfered with. Your petitioner submits that this principle does not apply to the facts of the case at bar, which are entirely different from those of the authorities above cited.

The issues decided by the Circuit Court strike a vital cord in receivership proceedings in the Federal Court and in the proper, equitable and orderly administration of such receiverships.

SECOND

THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Your petitioner has previously stated that there are no cases directly in point with the situation and facts of the case at bar. Nevertheless, there may be one or two cases of persuasive authority bearing on one or more questions arising in the present case. One such case is *U.S. F. & G. Co.* v. *Kenyon,* 204 U.S. 349.

In that case one entering into a contract with the United States Government for the construction of a public building filed a bond pursuant to a Federal statute which provided that any one contracting with the United States for construction of a public building was required to execute a bond with sufficient sureties conditioned that the contractor pay all materialmen and laborers and providing that materialmen and laborers who were not paid by the contractor

could bring suit on the bond in the name of the United States for their own benefit.

A materialman of the contractor in this case brought suit on the bond in the name of the United States in a Federal Court, against the contractor. The question before the Court was whether the Federal Court had jurisdiction over the action in view of the fact the value of the matter in dispute was less than $2000.

The Court held that the Federal Court had jurisdiction of the suit on the ground the United States was a real party in interest under the statute, and not merely a formal party to the bond. At pages 356 and 357 the Court said:

> "The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection. It may well have thought that the government was under some obligation to guard the interests of those whose labor and materials would go into a public building. . . . The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was

> therefore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for the labor and materials furnished to him in his work. There is, therefore, a controversy here between the United States and the contractor in respect of that matter."

To be sure, the bond in the above-cited case was given under a statute, and the majority of the Circuit Court in this case have tried to distinguish it on this ground (R. 79). Your petitioner, however, maintains that the case is persuasive authority in support of the proposition that the United States, through the receiver, its officer, is the real party in interest in the bond given by the purchaser of the assets in receivership. The United States is as interested in the bond in this case as it was in the case above cited, and the reasoning of the Court in the quotation above cited is equally applicable to the case at bar.

Mr. Justice Morton in his dissenting opinion supports the contention that the bond is not suable by individual creditors, but rather by the receiver as an officer of the United States. At page 81 of the record he says:

> "I also differ from my brethren in their construction of the bond, as being suable by individual creditors for their own benefit. It is conditioned only that Dempsey shall fulfill his contract with the receiver; there is nothing in it about creditors or their claims. In my opinion it was suable only on the relation of the receiver by whom it was taken and with whom the contract which it secured was made."

In the case of *Howard* v. *United States*, 184 U.S. 676, cited as controlling by the majority of the Circuit Court, this Court said that the United States was a merely nominal party to an official bond of a Clerk of Court. This is mere

dictum, and does not control the construction of the bond in the case at bar. The United States, through the District Court and its receiver, has undertaken the administration of the affairs of the business in receivership in this case. It has an interest in the orderly and equitable administration of these affairs, and in the payment of the creditors and the fulfillment of the conditions of the bond. The United States has no such interest and duty in an official bond, and therefore the dictum in the Howard case does not control the case at bar. See *Illinois Surety Company* v. *United States*, 226 Fed. 665.

The decision of the majority of the Circuit Court is therefore probably in conflict with the decision of this Court in *U.S. F. & G. Co.* v. *Kenyon*, 204 U.S. 349.

There is also one other persuasive authority of this Court with which opinion the majority of the Circuit Court is probably in conflict. That case is *Dietzsch* v. *Huidekoper et al.*, 103 U.S. 494. At page 497 this Court said:

> "The bond took the place of the property seized in replevin, and a judgment upon it was equivalent to an actual return of the replevied property. . . . The bill in this case was, therefore, ancillary to the replevin suit."

To be sure, this quotation is merely dictum, but the majority of the Circuit Court refused to apply it to the case at bar (R. 75):

> "We think this contention as applied to the admitted facts of this case is not sound. It might be said that a bond would take the place of the property purchased, if Dempsey had promised to pay the receiver the purchase price . . ."

The majority of the Court was in error. Dempsey did promise to pay the receiver the purchase price; he promised to pay the United States.

The purchaser took title and possession of the business and assets from the receiver, the officer of the United States, who represented all the creditors. In return for the assets and business, the purchaser gave a bond as security for his payment therefor. Certainly it could not be said that this security was given to all the creditors individually. On the contrary, it was given to the receiver, the party from whom the assets were purchased. Any other construction of the bond and of the facts would flaunt the common sense of the situation and the intention of the District Court and the parties.

THIRD

THE CIRCUIT COURT OF APPEALS HAS MADE A DECISION IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS ON THE SAME MATTER.

The majority in the Circuit Court argue that the order of the District Court on March 23, 1931, giving Raphael leave to sue on the bond was a final decree if it amounted to anything, and that it could not be modified or revoked on December 7, 1931, after the term at which it was entered had expired, the District Court having lost control of the matter (R. 77). In support of this proposition the Court cited *Odell* v. *Batterman*, 223 Fed. 292, a case decided by the Circuit Court for the Second Circuit.

Your petitioner maintains that the above reasoning and decision of the majority of the Circuit Court in this case is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *N.Y. Security & Trust Co. et al.* v. *Illinois Transfer R. Co.*, 104 Fed. 710. In that case the Court held that an order of a Federal Court granting leave to sue a Federal Court receiver in a State Court was not a final decree and was not appealable. The Court said, at page 710:

> "This appeal is from an order granting leave to sue in a state court a receiver appointed by the United

States circuit court. The order was made after the suit was brought and entered nunc pro tunc as of a date prior to the bringing of the suit. Whether for that reason it was invalid we do not consider. Such an order is discretionary and administrative, and therefore, in the opinion of the Court, is not appealable. The motion to dismiss the appeal is therefore sustained."

See *Investment Registry, Ltd.*, v. *Chicago & M. Electric Ry.*, 251 Fed. 510, where the Circuit Court of Appeals for the Seventh Circuit said, at pages 512 and 513:

"The prime end to be served is the due and proper conservation of the property in the hands of the Court, in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the Court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal Court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the Court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave.

"Under such circumstances, there is involved no question of comity between different courts, but only that of the best interest of the estate which the Court is administering. . . . The order granting leave is not final in the sense that thereby a definite status is fixed."

See also *Buckhannon & N.R. Co.* v. *Davis*, 135 Fed. 707, where the Circuit Court for the Fourth Circuit said, at page 709:

> "It is contended by appellant that the Court did not have power to revoke, annul or modify this order of October 27, 1903, which granted permission to sue the receiver, and reserved the question as to the forum in which suit should be brought. The Court undoubtedly had the right to attach any reasonable condition to the order which granted permission to sue the receiver, and, if necessary, to modify or revoke any order which it might have improvidently granted."

The decision of the majority of the Circuit Court in this case was wrong. The granting to Raphael of permission to sue on the bond did not amount to a final decree. If the District Court could give a creditor permission to sue on the bond, such permission did not amount to a final decree, and the District Court could modify or recall its permission at a later date.

FOURTH

THE CONSIDERATIONS AT STAKE IN THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS, AND THE RESULTS THEREOF, ARE OF SO GRAVE AND SERIOUS A NATURE AS TO WARRANT REVIEW BY THIS COURT.

As a result of the decision of the majority of the Circuit Court, the proper equitable and orderly administration of the receivership by the District Court will be hampered and is imperilled. Unless the execution in the Massachusetts State Court proceeding is restrained, Raphael may obtain a preference to the prejudice of the other creditors of The Stores. The assets of Dempsey and the sureties on his bond, Buff and Drake, are entirely unlisted stocks in relatively small local concerns, and certain real-estate interests. It is a matter of common knowledge today that assets of these sorts are of little and questionable cash value.

At the hearing on your petitioner's motion to modify the previous order giving Raphael leave to sue on the bond,

counsel for your petitioner spoke to the Court as follows (R. 55 and 56):

> "Now, Mr. Horblit (counsel for Raphael) is entitled to his money without question, but the other creditors are also entitled to their money.
>
> "The situation as I see it is this: If the court permits the entry of the decree in the Superior Court it will handicap this court in the administration of the receivership estate because we will have nothing to go against in order to enforce the decree of this court as to the payment of the money, except put him in jail. I would rather have the money than put him in jail. That is my entire position in this case."

Mr. Justice Morton in his dissenting opinion lays emphasis on the gravity of the situation resulting from the decision of the majority of the Circuit Court (R. 80):

> "The suit by the receiver and his recovery of a complete judgment covering the claims of all parties under the bond greatly changed the situation from what it was when leave to sue in the State Court was granted to Raphael. It became a question whether one creditor should be allowed to press his claim in competition with the receiver who was acting for all creditors and for the estate. In forbidding him from doing so, I think the District Judge was plainly right. The contrary view led to the curious spectacle of one creditor being permitted to compete against the receiver and the other creditors, to obtain a preference to which he is not entitled, through the means which were adopted to safeguard the payment of the purchase price for which the receivership property was sold. Raphael's complaint against the injunction order is that it deprives him of this advantage and puts him on an equality with the other creditors,—which I think is where he belongs,

while my brethren apparently think him entitled to his preference."

See the language of Mr. Justice Mack, speaking for the Circuit Court for the Seventh Circuit in *Ill. Surety Co.* v. *United States*, 226 Fed. 665, at 668:

> "The object of the bond is to afford protection to all beneficiaries alike. The support of the whole Bankruptcy Act would be violated if the vigilant depositor could, by suit in his own interest, exhaust the obligation. Each depositor is entitled to his proportionate share. If, however, each depositor could bring an action at law for his own use to obtain his proportionate share, the possible diversity of opinion as to what that share is might result either in subjecting the defendant to judgments in excess of the penalty or in defeating the just claims of later litigants. Only in a proceeding in which all parties will have an opportunity to be heard, and resulting in a judgment or decree that will be res judicata as to the surety as well as to all depositors, can justice be done."

The majority of the Circuit Court are in error when they said (R. 78) that it was evident there was no question of preference by Raphael over the other creditors, because Raphael had alleged in his plea that Drake and Buff possessed property of a value far in excess of the amount of their obligation to all the creditors of The Stores, and because in the preparation of the record on the appeal in this case it was agreed by the parties that "The statements set forth in the plea of Louis Raphael . . . with respect to said proceedings in the Suffolk Superior Court . . . and with respect to the proceeding in said United States District Court . . . are true" (R. 4). Your petitioner points out that it was *agreed* that the *statements with regard to said proceedings in the State and Federal Courts* were *true*.

There was *no agreement*, however, as to the *truth of the allegations in Raphael's plea* or the facts set forth therein, *other than* the *fact that certain pleadings were filed* and the *fact that the Court took certain action* thereon.

It is not true that there is no question of preference by Raphael over the other creditors.

Respectfully submitted,

WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.,
Attorneys for Petitioner.